SUPREME COURT OF QUEENSLAND

CITATION:	*Leisemann v Cornack & Anor* [2011] QSC 410
PARTIES:	**PAUL KENNETH LEISEMANN** (applicant) **v** **MAGISTRATE SHERYL CORNACK** (first respondent) **COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (second respondent)
FILE NO:	BS 5871 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2011
JUDGE:	Chief Justice
ORDERS:	**1. That the decision of the first respondent made on 8 June 2011 refusing the application made by the applicant's Counsel that she disqualify herself, be removed into this Court;** **2. That the first respondent's decision be set aside, and in lieu thereof, that the application be upheld and the first respondent be prohibited from continuing with the hearing; and** **3. That all necessary adjournments be entered, and that the hearing of the charge before the Magistrates Court on 8 June 2011 be remitted to the Magistrates Court for hearing de novo before a Magistrate other than the first respondent, on a date to be fixed.**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – IN GENERAL – REASONABLE SUSPICION OF BIAS – where the first respondent as Magistrate presided over summary trial of applicant on charge of assault occasioning bodily harm – where the complainant was upset while giving evidence and there were some clashes between defence counsel and the Magistrate – where the Magistrate had refused defence counsel's application to disqualify

herself for bias – whether a fair-minded lay observer might reasonably apprehend that the Magistrate might not bring an impartial mind to the resolution of the question committed to her

ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – PROHIBITION – GENERALLY – where Magistrate refused defence counsel's application to disqualify herself from hearing – whether an appeal could be brought to the District Court – whether the Magistrate's decision was administrative in character – whether orders in the nature of prohibition and certiorari should be made – whether there was any discretionary reason to refrain from intervening

Judicial Review Act 1991 (Qld), s 4, s 41
Justices Act 1886 (Qld), s 222

Chow v Director of Public Prosecutions (1992) 28 NSWLR 593, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, applied
Galea v Galea (1990) 19 NSWLR 263, considered
Lamb v Moss (1983) 49 ALR 533, cited
Lee v Cha [2008] NSWCA 13, cited
Magistrates Court v Murphy (1996) 89 A Crim R 403, cited
R v Watson; ex parte Armstrong (1976) 136 CLR 248, cited
Sankey v Whitlam (1978) 142 CLR 1, cited
Schneider v Curtis [1967] Qd R 300, cited
Stubberfield v Webster [1996] 2 Qd R 211, cited

COUNSEL: G S Andrew for the applicant
No appearance by the first respondent
M J Litchen (sol) for the second respondent

SOLICITORS: Quinn & Scattini Lawyers for the applicant
No appearance for the first respondent
Queensland Police Service Solicitor for the second respondent

[1] The first respondent, in her capacity as Magistrate, presided over a summary trial of the applicant on a charge of assault occasioning bodily harm. The hearing took place on 8 June 2011, and was not completed.

[2] The alleged incident involved the applicant kicking, hitting and throwing around his estranged partner at his house where she had gone to have dinner with him and their two young children. He allegedly caused bruising, and by bashing her head on a balcony floor, fractured a tooth which she subsequently lost.

[3] After a police officer and two neighbours had given evidence at the hearing, the complainant gave evidence and was cross-examined by Counsel for the applicant.

[4] Because of the configuration of the courtroom, the applicant was seated close to the witness box.

[5] The complainant was apparently upset as she gave her evidence, and the Magistrate exhibited appropriate solicitude for her condition.

[6] As the cross-examination proceeded, there were some clashes between the Magistrate and Defence Counsel. For example, the Magistrate asked Counsel not to raise his voice and referred to his "aggressive pose", saying: "I don't want this lady to feel attacked." That fell within the Magistrate's power to control the proceeding in her courtroom.

[7] A little later the Magistrate asked Counsel not to interrupt the complainant as she gave her evidence, which again was a reasonable request, and then later she said: "Could you not talk over the top of the lady when she is upset and crying?"

[8] That led into the Magistrate's telling the witness

> "…the reason you need to be composed is that you can't answer a question when you are upset and say something that's not right. So you have to get yourself calm."

That again was unexceptionable. In response to a submission to me, I record my view that Her Honour was not in that suggesting that the complainant should disagree with whatever was being put to her by Defence Counsel.

[9] Shortly after that, the Magistrate addressed Defence Counsel as follows:

> "I'm just going to interrupt here. If your client cannot listen to this evidence without making very rude, shaking his head and smirking at the witness and looking disrespectful, I'll just ask him to leave. Because I am going to observe his demeanour while she's giving evidence, which I am entitled to do throughout the proceedings, and I haven't said anything up to date, but he's rude. He's rude and he's patronising and he's not listening to her and allowing her to give her evidence in at least a non-hostile environment. When she gives her evidence he is smirking, snorting, sneering and making facial expressions of a demeaning nature.
>
> Now, if he can't control his face to listen, I just invite him to leave so that I can hear the evidence without being distracted by that and that is not putting undue pressure on the witness. He is sitting – he is the closest person to her. I'd prefer it if he sat on the other side of the room if he is going to behave like that, to get away from her."

Her Honour then addressed the applicant:

> "So I invite you, Mr Leisemann, to either leave if you can't control yourself or sit at the back, please.
>
> DEFENDANT: Can I grab a tissue please so I can-----
>
> BENCH: Grab a tissue?
>
> DEFENDANT: Yeah.

> BENCH: You don't need a tissue when you are smirking. Yes, have as many tissues as you like. But don't take them all away from the other person needing tissues.
>
> So I take it you are going to calm down and you are not going to be making those facial expressions. Thank you."

[10] Counsel for the applicant addressed me on the basis that the applicant had not misconducted himself as the Magistrate said he had. I obviously could not find one way or the other: I have to determine the matter on the basis the Magistrate believed he had.

[11] Following the above exchange, Counsel for the applicant applied for "a mistrial on the basis of perceived bias". The Magistrate ruled against the applicant.

[12] In the course of the submissions which preceded the ruling, the Magistrate said:

> "So, I think that you're coming at this with a little bit of a prejudice about female judicial officers because you're thinking that I'm going to be a victim, identify, and that is inaccurate. Because you're the one who raised the word 'victim', I never mentioned the word 'victim'."

Then there was an exchange about who had used the word "victim". This material does not bear on my approach to the case: I mention it because my attention was directed to it.

[13] After the Magistrate's ruling, the complainant continued with and concluded her evidence. Then the Magistrate addressed her in these terms:

> "Thank you for coming to Court today. We appreciate your evidence and you're excused now, I'd just check with you that you've – have you got details about – just disregard that. Thank you, you're excused from giving evidence now."

[14] It was suggested that the Magistrate was about to seek to elicit "details" which would inform any sentencing, or the setting of compensation, suggesting prejudgment of guilt. That is really quite speculative. If the Magistrate wanted more material, then I would prefer the view that she was simply keen to ensure that all relevant "details" were before the court in case there were ultimately a finding of guilt: it did not suggest pre-judgment. This matter, also, does therefore not influence my disposition of the case.

[15] The issue the Magistrate had to address was whether "a fair-minded lay observer might reasonably apprehend that the [Magistrate] might not bring an impartial mind to the resolution of the question" committed to her (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344-5).

[16] Ms Litchen, who appeared for the second respondent (the Commissioner of the Queensland Police Service) stressed the need for an examination of the whole record, and relied substantially on these passages from *Galea v Galea* (1990) 19 NSWLR 263 cautioning against undue scrutiny and urging the adoption of an appropriately robust assessment of the courtroom conduct of a judicial officer:

> "In judging the suggestion of a supervening apprehension of bias, it is reasonable to assume that the hypothetical lay observer would base the opinion on a fair assessment of the judge's conduct in the context of the whole of the trial. A judgment of the loss of impartiality and neutrality would not be made from a short and emotional exchange taken out of context and then weighed in isolation. Judges, like witnesses, are human. Despite their professional training they are, in varying degrees, likely to show the range of emotions to which humanity is heir. Whilst patience is a judicial virtue, so also is a concern about justice, the efficient conduct of proceedings, and the avoidance of unnecessary delay, including to other litigants awaiting their hearing. Judges should understand the variety of skills in communication that exist in the community. Some people are pedantic, even without wishing to be so. I get the impression that the appellant liked to take fine points of language which might delight a seminarian but which could cause irritation to a busy judge who thereby formed the opinion that he was temporising and evading questions which were embarrassing to him. Some of the expressions of Powell J, combed over in a detailed appellate examination of the transcript, are such that, with hindsight, they could doubtless have been improved. On the other hand, the right, and perhaps the duty, of the judge to expose the development of his thinking to the appellant, and explain and justify what he said, can be viewed as a whole and seen in the context." (per Kirby A-CJ, p 279)
>
> "In my view, if a reasonable disinterested bystander had heard the passage at arms complained of in the present case he would not have reasonably apprehended that the trial judge was prejudiced, he would only have noted that an exceptionally irritating witness had eventually succeeded in irritating the judge." (per Meagher JA, pp 283-8)

[17] On the other hand Mr Andrew, who appeared for the applicant, submitted that the Magistrate erred in not disqualifying herself. The argument tended to centre, at the hearing, on the passage extracted in paragraph 9 above.

[18] The Magistrate took no active part in the present proceeding, indicating she would abide by any order the court might make.

[19] At the commencement of the hearing, I queried whether this court could or should properly enter upon the matter. I pointed out that the correctness of the Magistrate's ruling could be raised on the hearing of an appeal against conviction, in the event that the Magistrate convicted the applicant.

[20] I also queried whether an appeal could be brought to the District Court, drawing the response that it could not because the Magistrate's ruling was not a final determination in the matter. That is correct. The term "order" in s 222 of the *Justices Act* 1886 (Qld) has been construed to exclude interlocutory orders such as this one. See *Schneider v Curtis* [1967] Qd R 300, 303-6.

[21] As to the applicability of the *Judicial Review Act* 1991 (Qld), Mr Andrew contended that the Magistrate's decision was administrative in character. The Act defines

"decision to which this Act applies" as "a decision of an administrative character made…under an enactment" (s 4). But this ruling not to excuse herself was plainly a judicial decision. It differs from a decision whether or not to commit a defendant for trial made at a committal proceeding, which is administrative in character: *Sankey v Whitlam* (1978) 142 CLR 1, 83 and *Lamb v Moss* (1983) 49 ALR 533, 558-559. This ruling was made in the course of the summary hearing of a criminal charge, and is quite different (*Stubberfield v Webster* [1996] 2 Qd R 211).

[22] The form of the originating application correctly, however, identified section 41 as the source of the court's jurisdiction. The hearing proceeded on the assumption that certiorari and prohibition could have accommodated a challenge to this ruling (notwithstanding the application did not refer to prohibition). Following the hearing, I invited written submission on the question whether they could.

[23] Section 41 of the *Judicial Review Act* provides as follows:

> "**41 Certain prerogative writs not to be issued**
>
> (1) The prerogative writs of mandamus, prohibition or certiorari are no longer to be issued by the Court.
>
> (2) If, before the commencement of this Act, the court had jurisdiction to grant any relief or remedy by way of a writ of mandamus, prohibition or certiorari, the court continues to have the jurisdiction to grant the relief or remedy, but must grant the relief or remedy by making an order, the relief or remedy under which is in the nature of, and to the same effect as, the relief or remedy that could, but for subsection (1), have been granted by way of such a writ.
>
> (3) In an enactment in force immediately before the commencement of this Act, a reference to a writ of mandamus, prohibition or certiorari is taken to be a reference to an order of a kind that the court is empowered to make under this section."

[24] The relevant prerogative writs would be certiorari and prohibition. Certiorari would bring up the record of the decision for review, to be quashed if made without jurisdiction. Prohibition would order the Magistrate not to continue with the hearing. (See Benjafield and Whitmore: Principles of Australian Administrative Law, 4th Edition, p 191). It is primarily prohibition which would fall for consideration here, bearing on whether the hearing should continue before the first respondent.

[25] An arguably erroneous refusal by a Judge to stand aside may be challenged by applying for prohibition. See *R v Watson; ex parte Armstrong* (1976) 136 CLR 248, 262, *Magistrates Court v Murphy* (1996) 89 A Crim R 403, 432-433, and *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593, 618. That would extend to the complementary application of certiorari.

[26] I am satisfied that the court's jurisdiction under s 41(2) of the *Judicial Review Act* applies in this case.

[27] I turn then to the challenge to the Magistrate's ruling, which as I have said focuses on what Her Honour said in the passage set out in [9] above.

[28] The Magistrate therein expressed her conclusions on matters which surpassed what the applicant had done, and – on my respectful analysis – bore on the applicant's character. The Magistrate did not confine herself to alerting Defence Counsel to the applicant's physical conduct, for example (if it occurred) rolling the eyes, affecting disbelief, shaking the head, spluttering etc. The Magistrate went beyond that, to the point of expressing the conclusions she drew from what she observed as his misbehaviour, which were that the applicant was a rude and patronizing person, bent on creating a hostile environment, putting undue pressure on the complainant and demeaning her.

[29] The complainant's case was that in their domestic situation, the applicant behaved in that sort of way. The complainant gave evidence that the applicant "put [her] down", with name-calling etc, that he was aggressive, abusive and argumentative, and she described a particularly violent assault committed upon her (that charged) – which the applicant denied. The determination of the charge depended on assessment of the comparative credibility of the complainant and the applicant, as there were no other eye-witnesses to the alleged assault.

[30] I am drawn to the conclusion that in circumstances where the Magistrate had expressed her conclusions as strongly as she did, a fair-minded lay observer – in terms of the relevant test – might reasonably apprehend that the Magistrate might not bring an impartial mind to the resolution of the question whether the Prosecution had established beyond reasonable doubt that the applicant was guilty of the assault alleged and described in evidence by the complainant.

[31] The Magistrate quite properly referred to her power to control the courtroom. It is clearly important that if a judicial officer notices inappropriate conduct which could prejudice the integrity of the process, steps be taken to put a stop to it at once.

[32] It will often be effective to ask the offending participant to leave the courtroom, and ask the current witness to leave, then calmly report to the relevant legal representatives what is occurring, allowing a break so the matter can be taken up with the person said to be at fault.

[33] I sense that the problem here was that the matter was not nipped in the bud early in the piece, but allowed to fester to a point where the Magistrate, obviously frustrated, expressed herself in strong terms reflecting quite adversely on the character of the applicant.

[34] Acknowledging these things: that judicial officers can change their minds, that a preliminary assessment may be superseded, that even a finding of rudeness and of being patronizing and of being what amounted to intimidating, does not necessarily entail a complete rejection of the person's credibility as a prospective witness – it is nevertheless the strength of the terms by which the Magistrate criticized the applicant's behaviour which leads to the result which I consider must regrettably ensue here.

[35] Judicial officers are human beings and not expected to be paragons of restraint, but as I suggested during argument, the expectation (relevantly for the present, of the

"fair-minded lay observer") is they will come close to that ideal. The regrettable slippage in this case was too substantial to leave the proceeding salvageable. The Magistrate plainly, and genuinely, felt concern: it was the way she ventilated it which created the problem. I am not to be taken to doubt the Magistrate's capacity notwithstanding to have made a dispassionate determination had the matter proceeded to a conclusion: the abiding consideration for the present is however perception of the process.

[36] The Magistrate's decision not to disqualify herself should therefore be quashed, utilizing the mechanism provided for by s 41 of the *Judicial Review Act*.

[37] There is no discretionary reason to refrain from intervening (cf. *Lee v Cha* [2008] NSWCA 13, para 28) such as the availability of an ultimate appeal, to which I referred in para [19], or the undesirability of disruption of and delay in the trial of a criminal charge. Those features are outweighed by a finding of apprehended bias. Also, the Magistrate very fairly stopped the hearing after the complainant's evidence so there would be opportunity for this challenge; Counsel for the second respondent did not oppose this court's entering upon an examination of the sustainability of the Magistrate's decision; and that issue was comprehensively explored before me. In these circumstances, I should determine the merit or otherwise of the contention.

[38] I therefore order:

1. that the decision of the first respondent made on 8 June 2011 refusing the application made by the applicant's Counsel that she disqualify herself, be removed into this Court;
2. That the first respondent's decision be set aside, and in lieu thereof, that the application be upheld and the first respondent be prohibited from continuing with the hearing; and
3. That all necessary adjournments be entered, and that the hearing of the charge before the Magistrates Court on 8 June 2011 be remitted to the Magistrates Court for hearing de novo before a Magistrate other than the first respondent, on a date to be fixed.

[39] It was agreed that no order be made as to costs.